STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DANE RICHARD KRUKOWSKI,

Defendant-Appellee.
_____/

Supreme Court
No. 160263

Court of Appeals
No. 334320

Lower Court
No. 15-041274-FH

PLAINTIFF-APPELLANT'S REPLY TO DEFENDANT-APPELLEE KRUKOWSKI'S SUPPLEMENTAL BRIEF

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Argument

I. The prosecution has argued consistently since the inception of this case that defendants were criminally liable under MCL 750.136b(3)(b) because they committed intentional acts that were likely to cause serious physical harm to the child.

Defendant Krukowski first argues in his supplemental brief that the prosecutor's *only* theory of liability at trial was based on defendants' failure to take their infant to receive appropriate medical care after the bathtub fall—an omission under MCL 750.136b(3)(a).[1] This is inaccurate. The felony information did not indicate that defendants were charged only under Subdivision (a) of MCL 750.136b(3), but rather that defendants' actions were "contrary to MCL 750.136b(3)-(4)," i.e., the second-degree child abuse statute generally. The description of the offense in the information encompassed *both* MCL 750.136b(3)(a) *and* (b) and specifically referenced the "intentional act" provision of Subdivision (b), alleging that defendants "knowingly or intentionally commit[ed] an act likely to cause serious physical or mental harm to a child . . . ." Felony Information, 6/3/15.

Defendant Krukowski argues that the prosecutor relinquished any intentional act theory under MCL 750.136b(3)(b) during opening argument, when he stated that he would be unable to prove an intentional act.[2] This inaccurately describes the People's theory at trial and the prosecutor's opening argument. In his opening statement, the prosecutor explained the following:

> [T]his opening statement is for me to tell you what I intend to prove, what evidence you can expect, here. But I want to tip you off right now,

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[1] Defendant Krukowski's supplemental brief, p 16.

[2] Defendant Krukowski's supplemental brief, p 16.

> what I will not prove, in this case, in the People's case, when we are calling our witnesses, and before we—evidence, and before we rest, *we will not prove that the skull fracture or a particular broken arm or rib or a particular brain bleed or the resulting fluid buildup from that bleed or a particular retinal hemorrhage in one or the other of the eyes was specifically caused by him or her*.
>
> If the evidence, in this case, could show an intentional act by one or both of them, the criminal charge would be a higher degree. It wouldn't be second degree, it would first degree; it would be intentionally-caused child abuse or injury. [App 5b [174-175] (emphasis added).]

Read in context, the prosecutor's statement that he would not be able to prove an "intentional act" referenced the idea that he would be unable to prove that defendants *intentionally caused the child's injuries*, i.e., first-degree child abuse.[3] Neither the information nor the prosecutor at trial, however, ever foreclosed the possibility that defendants could be culpable under an "intentional act" theory pursuant to Subdivision (b) of MCL 750.136b(3). The defense attorneys recognized this theory was in play at trial. (See Tr 5/5/16, 42-43, attached "The Information is drawn, essentially these alternatives . . . they have three theories, alternatives here. . . . The third is act likely to cause serious physical harm. Defendant knowingly or intentionally did an act likely to cause serious physical harm to Roegan Krukowski, regardless of whether such harm resulted."). An "intentional act" theory under Subdivision (b), along with the prosecution's "reckless act" and "willful abandonment" theories under Subdivision (a), was presented before the jury at trial. See App 219-220a [145-146].

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[3] See also Tr 5/5/16, 38, attached ("The People aren't claiming that there is *intentional damage done*[.]") (emphasis added).

Defendant Krukowski acknowledges in his supplemental brief that the prosecutor at trial repeatedly argued an "intentional act" theory to the jury: "The prosecutor's closing argument . . . was full of references to Mr. Krukowski's and Ms. Stevens' failure to immediately seek medical attention *and* ***the act*** *of using the home remedy of ice and water*[.]"[4] Defendant Krukowski is correct that the prosecutor at trial pursued an omission theory under MCL 750.136b(3)(a), but this was not the prosecutor's *only* theory of liability.

Defendant Krukowski contends that the prosecution "[f]or the first time in its brief to this Court" suggested that defendant's act of the giving the infant water could support their convictions under an "intentional act" theory.[5] This, too, is inaccurate. The trial prosecutor argued at trial that defendants administered dangerous home remedies after the fall, and specifically mentioned the provision of water, which constituted acts that were likely to cause serious physical harm for purposes of MCL 750.136b(3)(b) (App 17b; 38b; App 220a). Defendant acknowledges that the prosecutor made this argument at trial,[6] and he cites no authority for the proposition that a litigant must restate an argument ad nauseam to preserve the issue for appellate review. Defendant Krukowski also asserts that harm did not result from the act of giving the infant water, but the occurrence of harm is not required to establish criminal culpability under the intentional act theory of MCL 750.136b(3)(b).

Defendant Krukowski asserts that the act of giving the infant water could not

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[4] Defendant Krukowski's supplemental brief, p 17 (emphasis added).

[5] Defendant Krukowski's supplemental brief, p 25.

[6] Defendant Krukowski's supplemental brief, pp 24-25.

support defendants' convictions under a "reckless act" theory of MCL 750.136b(3)(a) because there was no proof that the water given ultimately caused the infant's injuries.[7] But the People have never argued before this Court that the provision of water could support defendants' convictions under a reckless act theory. See People's supplemental brief, p 16.

II. Defendants' convictions should be affirmed under a willful abandonment theory.

Defendant Krukowski next argues that the term "abandonment" in MCL 750.136b(1)(c) should mean a "*permanent* or *perpetual* renouncement of duties over a child . . . with the *intent* to do so," as the term "abandonment" has been defined by Michigan courts in other statutory contexts.[8] There are two problems with applying such an interpretation in the context of MCL 750.136b(1)(c), however. First, in this Court's precedents interpreting the term "abandonment" in other statutory contexts, the term "abandonment" was always the intent element of the criminal offense. See People's supplemental brief, p 33. By contrast, the word "willful" in MCL 750.136b(1)(c) speaks to the issue of intent. More importantly, MCL 750.136b(1)(c) defines "omission" using two separate and distinct clauses: "a willful failure to provide food, clothing, or shelter necessary for a child's welfare ***or*** willful abandonment of a child." (Emphasis added.) Interpreting the word "abandonment" in this statutory context to mean a total and permanent abdication of all parental rights and duties would subsume the specific mention of "food, clothing, or shelter" in the

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[7] Defendant Krukowski's supplemental brief, p 26.

[8] Defendant Krukowski's supplemental brief, p 21.

former clause. It is for precisely this reason that the Pennsylvania Supreme Court in *Commonwealth v Skufca*, 457 Pa 124, 130; 321 A2d 889 (1974), interpreting a nearly identical criminal statute, held that the statute did not require "proof of conduct on the part of the accused which exhibits a purpose to forego parental duties and relinquish parental claims . . . ."

Defendant Krukowski contends that the People's proposed definition, and a holding by this Court that defendants willfully abandoned Roegan in this case, would turn MCL 750.136b(3)(a) into a sweeping, catch-all provision that would remove "all parental discretion in matters of child care."[9] The People disagree. Parents have discretion to raise and care for their children, but that discretion is not without limits. The Legislature has imposed one of these limits by criminalizing a parent's omission—or "willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child"—when that omission causes serious physical or mental harm to child. MCL 750.136b(1)(c) and (3)(a). The statutory phrase "willful abandonment" must mean something, but it seemingly can't mean either a total and permanent abdication of *all* parental duties or *any* temporary parental neglect of duty without running into interpretive issues in light of the Legislature's specific mention of "food, clothing, or shelter." The People suggest that their proposed definition would reconcile the two clauses in MCL 750.136b(1)(c).

Finally, imposing criminal liability in this case would not lead to a slippery slope, as defendant Krukowski suggests, that would "quite literally require parents

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[9] Defendant Krukowski's supplemental brief, pp 22-23.

to take their child to the hospital after any potential injury."[10] Simply put, this case does not involve an ordinary exercise of parental discretion. The facts show that a barely two-month-old infant was dropped from several feet in the air and struck his head on the side of the bathtub. Defendants sought no medical treatment for the child immediately after the fall, despite their admissions that he was inconsolable. App 65a [26], 69a [44]. When Stevens did take the infant to a pediatrician for a regularly scheduled appointment two days later, she hid the fall from the pediatrician, despite being asked directly whether a fall had occurred. Defendants make much of the fact that Stevens testified at trial that she *did* inform Dr. Dawis about the bathtub fall, but Dr. Dawis testified that Stevens expressly denied any fall (App 65a [25-26]). And Dr. Dawis even went so far as to write in her notes for the appointment that "mom denies any fall" (App 65a [26]). The jury was free to credit Dr. Dawis's testimony and to discredit Stevens's. See *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005) ("Fundamentally, it is the province of the jury to assess the credibility of witnesses."). Then, it was not until two weeks later when the infant was seizing and close to death that defendants finally sought out professional medical care. See App 128a [25-26]; 129a [29]. Defendants left their infant child, incapable of protecting himself, without the aid of professional medical treatment after he sustained a multi-foot fall and traumatic head injury and even thwarted the intervening opportunities of medical professionals like Dr. Dawis to provide appropriate medical care.

[10] Defendant Krukowski's supplemental brief, p 23.

III. Defendants possessed the intent needed to establish criminal liability under the prosecutor's intentional act theory, MCL 750.136b(3)(b).

Defendant Krukowski claims on appeal that, in order to support a conviction under the intentional act theory of MCL 750.136b(3)(b), the prosecutor needed to prove not only that defendants intended to act, but that they "knew or intended likely harm" to flow from their actions.[11] Defendant misunderstands of the intent requirement of MCL 750.136b(3)(b).

In *People v Maynor*, 256 Mich App 238, 242; 662 NW2d 468 (2003) (*Maynor I*),[12] the Court of Appeals explained that "second-degree child abuse [under MCL 750.136b(3)(b)] is an example of a general-intent crime." Specific intent is defined as a particular criminal intent beyond the act done, whereas general intent is merely the intent to perform the physical act itself. See *People v Beaudin*, 417 Mich 570, 574; 339 NW2d 461 (1983). On appeal to this Court in *Maynor I*, see *People v Maynor*, 470 Mich 289; 683 NW2d 565 (2004) (*Maynor II*), this Court interpreted the first-degree child abuse statute, MCL 750.136b(2), which makes it a crime when a person "knowingly or intentionally causes serious physical harm or serious mental harm to a child." The *Maynor II* Court reasoned that the phrase "knowingly or intentionally" modified the phrase "causes serious physical or serious mental harm to a child," and thus required more than simply proof that the a defendant "intend[ed] to commit an act." *Id.* at 295. Rather, the Court held, the prosecutor needed to prove that the

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[11] Defendant Kruwkoski's supplemental brief, p 29.

[12] Affirmed for different reasons, *People v Maynor*, 470 Mich 289, 291; 683 NW2d 565 (2004).

defendant "intended to cause serious physical or mental harm to the child or that she knew that serious mental or physical harm would be caused . . . ." *Id.*

In a concurring opinion, Justice WEAVER, joined by Justices CAVANAGH and M. J. KELLY, compared the language of the first-degree child abuse statute with MCL 750.136b(3)(b), the "intentional act" provision of the second-degree child abuse statute. Justice WEAVER explained:

> In the second-degree child abuse provision, the words "knowingly" and "intentionally" modify the phrase "commits an act." Thus, to establish second-degree child abuse, the prosecution must prove only that a defendant intended to *commit an act* likely to cause harm. The prosecution does not have to prove that a defendant intended serious physical or mental harm.
>
> Had the Legislature intended that it be enough to sustain a conviction for first-degree child abuse by proving only that the person intended to commit the act that caused harm, the Legislature could have included language similar to the language used in the second-degree child abuse provision and stated: it is first-degree child abuse to "knowingly or intentionally commit an act that causes serious physical or mental harm to a child." But the Legislature chose not to include this phrasing, and I will not usurp the Legislature's role by reading this additional language into the statute. [*Id.* at 300-301 (WEAVER, J., concurring).]

The words "knowingly or intentionally" in MCL 750.136b(3)(b) modify the immediately following phrase "commits an act." Thus, a defendant will be guilty of second-degree child abuse under MCL 750.136b(3)(b) if he or she knowingly or intentionally *commits an act*, and that act is likely to cause serious physical or mental harm to a child, regardless of whether the defendant intended to cause harm or knew that harm was likely to result. Defendant Krukowski contends that such an

interpretation of MCL 750.136b(3)(b) is absurd,[13] but he offers no authority for his contrary position that the prosecution must prove a defendant intended serious harm to result from his or her actions to sustain a conviction under MCL 750.136b(3)(b).

IV. The People do not argue that *Stevens*'s acts of lying to Dr. Dawis and obtaining chiropractic treatment for the infant could support *Krukowski*'s conviction under an intentional or reckless act theory.

Finally, defendant Krukowski argues that the prosecution may not rely on Steven's acts of lying to Dr. Dawis or taking Roegan for chiropractic treatment to support any convictions of second-degree child abuse in this case.[14] At the outset, the People do not argue that these acts could be used to support defendant *Krukowski*'s convictions under an intentional or reckless act theory—only defendant Stevens's. To the extent defendant Krukowski argues this issue on defendant Stevens's behalf, Krukowski contends that these acts were not encompassed by any of the trial prosecutor's theories presented to the jury, so the prosecution waived the issue for appellate purposes. The People acknowledged in their supplemental brief that it is arguable whether these acts were encompassed by the prosecutor's "home remedies" theory at trial, but believed a rationale argument could be made that these acts were included as part of this theory. See People's supplemental brief, p 23 n 18. If this Court disagrees, defendants' convictions should still be affirmed on the basis of either an intentional act theory, MCL 750.136b(3)(b), or a willful abandonment theory, MCL 750.136b(3)(a), People's supplemental brief, Issues I.A. and II.

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[13] Defendant Krukowski's supplemental brief, p 29.

[14] Defendant Krukowski's supplemental brief, p 30.

Summary and Relief Sought

The People respectfully ask this Court to reverse the decision of the Court of Appeals. Alternatively, if the Court concludes that the People are not entitled to the relief they seek, we would ask the Court to consider issuing an opinion that affirms the decision of the Court of Appeals, but clarifies the scope of the second-degree child abuse statute.

Respectfully submitted,

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Dated: September 16, 2020

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ATTACHMENT

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN,

vs. File No. 15-041274-FH-3
VOLUME VI of VII

DANE RICHARD KRUKOWSKI,

Defendant.
_____/

PEOPLE OF THE STATE OF MICHIGAN,

vs. File No. 15-041275-FH-3
VOLUME VI of VI

CODIE LYNN STEVENS,

Defendant.
_____/

JURY TRIAL

BEFORE THE HONORABLE JANET M. BOES, CIRCUIT JUDGE

Saginaw, Michigan - May 5, 2016

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more. And that's really all that the People are claiming, and you'll get that by hearing the instructions from the court.

The People aren't claiming that there is intentional damage done, the way you would if you haul off and hit somebody with your fist, or hit them over the head with a club, or took the baby and threw the baby against the bathtub. That would be intentional. Child abuse first degree. That's not what you have to decide. You have to decide, as parents, did they have an obligation which they abandoned? In other words, an act -- an omission to do something you have to do. Which parents have to do. That's why you have the parent/child relationship and those duties. All the people who have to step in the role of parents who don't do the job understand their duties, CPS, the police, the doctors, they behave in a way that protects the child.

Codie and Dane didn't. Fearful of CPS, fearful of them getting in between them and their baby, fearful of being told how to raise their baby, perhaps fearful of losing their baby as you are heard Codie Stevens say when she was under oath. It's the last time I saw the baby.

They chose to do the home doctoring, the home remedy. That was reckless. That's like that lady on the car commercial where the car -- the crash happens in slow

motion, showing her daughter in the back, look at this picture I got. Look, somebody tweeted me this or texted me this. Crash. That's reckless. What she did and what he did is even more reckless than that TV example I just mentioned. What they did was knowing the injury had happened, because it's visible either the 7th or the 8th of February. They took no action. And by the way they acted, that's a choice. That's an act. We are going to put cold stuff on this baby's head. We are not going to not take the baby in. This is what we are going to do. And that's an intentional act that could lead to injuries.

That's second-degree, in its various theories and various forms. It doesn't matter, as the court will instruct you, if six of you say it's a reckless act, and four of you say in the jury room it's more like the person, they abandoned their duty -- let me do my math right. Three of you say it's an intentional act, they acted intentionally in a way that could lead to injuries, even if they don't occur, they could lead to injuries. You don't have to be unanimous about which theory of child abuse second-degree is proven, as long as all agree that at least one of them is proved. How could you not conclude that from the evidence in this case? Thank you.

THE COURT: All right. Mr. Bush?

MR. BUSH: May it please the court, counsel, members of the jury.

Well, when the state accuses a citizen of a crime and that citizen pleads not guilty, says I didn't do it, this is where we end up, in front of a jury of other citizens, sworn as you are, to decide the case on the law and the evidence, and in so doing we operate under what's known as the presumption of innocence. You heard about that a long time before you got summoned for jury service.

That concept is included in the instructions that the court will give you after the arguments are through. In fact, it was in the instructions that you already -- the preliminary instructions you already heard. But I'd like to just take a moment to give you my perspective on that phrase, concept, as Codie Stevens' representative in this case.

The rule says that the accused is presumed to be innocent, unless and until that presumption is overcome by proof beyond a reasonable doubt of each and every element of any charge brought against the accused.

The concept of proof beyond a reasonable doubt, as I say, is included in the jury instructions, but it may be one of those things that you -- you know it when you see it, when you -- but you can't define it. And I'd

say simply that if you're convinced of something beyond a reasonable doubt, you're as sure as a human being can be. Maybe nothing's a hundred percent in life, but beyond a reasonable doubt, you gotta be certain.

That rule, if you think about it, is there to protect all of us against false accusations, mistakes, and overreaching on the part of the state, and it does protect us against those things so long as jurors apply it. And I'm speaking hypothetically now, but you, once you -- these arguments and you've received your final instructions, you retire to a jury room and you deliberate in private. And what goes on in that jury room you never have to talk about to anybody at any time. You could theoretically, or hypothetically, take that rule and throw it out. Say, jeez, something bad happened here, but why don't we just get this over with, get on with it, bring in a conviction and move on.

The problem of course with that is that, today, Codie Stevens is sitting in that chair. Tomorrow, it could be any one of the rest of us, or somebody that we care about, and with another jury and facing some charge, and if you throw the rule out in this case, the next jury can do it in the next case, the next jury after that. Pretty soon it doesn't exist anymore, and nobody's protected against false accusations, mistakes, and

overreaching by the state.

That same instruction is given in any criminal case, from disturbing the peace to first-degree murder, because that's the cornerstone of our system. And on behalf of defendant Codie Stevens, I am requesting, as I have a right to and obligation to, members of the jury, the application of that rule, first and foremost. No more, maybe, but for sure no less than that.

The prosecutor, the prosecution requests that you second-guess a judgment call made by my client back in February of 2015. And that request is made on the basis of another request, which is that you speculate on what happened back during the week of February 14th to February 22nd, the date that Roegan was taken to the hospital.

The Information in the case alleges that the offense charged occurred on or about February 7th, 2015, to February 22nd, 2015, and alleges that my client did cause serious physical harm and/or knowingly or intentionally commit an act likely to cause serious physical or mental harm to a child, by failing to seek medical treatment after significant trauma which resulted in further or exacerbated physical injury or deterioration of the child's health and/or intentionally causing physical trauma. That Information is drawn,

essentially these alternatives -- alternative theories that the prosecutor mentioned towards the end of his argument, and involving an allegation, allegations, of, that you decide, either abandonment of the child -- they have three theories, alternatives here. These, you know you'll get these in writing, but the first is abandonment, that the defendant willfully abandoned Roegan Krukowski and third that, as a result, Roegan Krukowski suffered physical harm, serious physical harm.

Second is reckless act. Defendant did some reckless act -- this is from the jury instruction -- consisting of treating Roegan Krukowski with inadequate home remedy for an obvious head injury, rather than seeking professional medical treatment.

The third is act likely to cause serious physical harm. Defendant knowingly or intentionally did an act likely to cause serious physical harm to Roegan Krukowski, regardless of whether such harm resulted. The intentional act alleged consists of treating Roegan Krukowski with inadequate home remedy for an obvious head injury, rather than seeking professional medical treatment.

So, as alleged in the Information at least, the case began on the 7th of February when, there on Colony Drive, during a bath, Mr. Krukowski lost control of

Roegan and he hit his head on the side of a bathtub.

He summoned my client upstairs, she went upstairs, they both looked after the child at that time and decided to wait. They talked with my client's mother, and they had an appointment already scheduled for that coming Monday, February 9th, with Dr. Dawis who was their pediatrician. Dr. Dawis had treated their daughter, Ella, previously.

My client indicated under oath on the stand that she, Ella being her first child, she had been taken to the emergency room maybe five, six times for various things, and that that experience, apparently together with what medical knowledge she had acquired at this Ross Medical Institute, at least gave her some indication or confidence that she could handle what had happened there and at least wait until the appointment with Dr. Dawis. The implication being, as I think you can conclude, that perhaps some of the visits that Ella made to the emergency room maybe, maybe all of them, weren't really necessary, and that that was in my client's mind at this time.

At any rate, they kept the appointment with Dr. Dawis and -- who measured the child's head and who did this maneuver, slapping the table and so forth. The main -- the current problem being, at that time at least,

vomiting and that there was a formula problem, apparently. And my client had delivered the child on December 6th by Cesarean, as she has described, and that, at least in her memory, was a rough delivery. She indicated that after the delivery, the child's head was black and blue, and we've got Exhibit 26 which you can have access to in the jury room and it depicts his head basically right after the birth. You can consider it in making a judgment on her testimony regarding this birth.

At any rate, Dr. Dawis, back five days after the birth, examined Roegan and at that time there was a vomiting issue, and but the doctor diagnosed him as a well child. And her general instructions were to call her any time, I think she testified she's available 24/7, and her advice to her patients, general advice to her patients, was come and see me before you go to the emergency room. She testified to that.

Well, going back to February the 9th, she referred my client and the child to the chiropractic clinic down the road, which apparently that's a routine with Dr. Dawis, she does that routinely. Although she testified, as I recall, that she didn't know what they did down there, she says, what action the chiropractors took, but this was certainly not her first referral of a patient down there, and she referred them for an exam